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No. 99-5739

Supreme Court, U.S.
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In the Supreme Court of the United States

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Section 844(i), 18 U.S.C., prohibits the arson or attempted arson of property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The question presented is whether, in light of *United States* v. *Lopez*, 514 U.S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see *DeBartolo Corp.* v. *Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988), Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 40-44) is reported at 178 F.3d 479. The opinions of the district court denying petitioner's pre-trial motion to dismiss (J.A. 4-7) and his motion for judgment of acquittal following discharge of the jury (J.A. 23-28) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1999. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section Eight of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States * * *.

Section 844(i), 18 U.S.C., provides in pertinent part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned * * *.

STATEMENT

This case concerns whether the federal crime of burning "property used * * * in any activity affecting interstate * * * commerce," 18 U.S.C. § 844(i), applies, and constitutionally may apply, to petitioner's arson of his cousin's private residence, a structure in which no commercial activity took place.

A. Enactment And Amendment Of 18 U.S.C. § 844(i)

1. Section 844(i) was enacted as part of Title XI of the Organized Crime Control Act of 1970, in the wake of a rash of bombings and attempted bombings committed by domestic terrorist organizations and radical student activists. See 116 CONG. REC. 35,206 (1970) (Rep. Clancy); H.R. REP. NO. 91-1549, at 38 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4013. In an effort to "get tough with * * * terrorists" (116 CONG. REC. 36,296 (Sen. Fannin)), members of Congress introduced several bills to criminalize the wrongful possession, transfer, and use of explosives. See *Explosives Control: Hearings before Subcomm. No. 5 of the House Comm. on Judiciary on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals*, 91st Cong., 2d Sess. 4-32, 164-181, 342-447 (1970) ("*Explosives Control Hearings*") (reprinting bills). One bill, H.R. 16699, would have criminalized the bombing or attempted bombing of "any * * * property used for business purposes by a person engaged in commerce or in any activity affecting commerce." H.R. 16699, 91st Cong., 2d Sess. 4 (1970).

At hearings on H.R. 16699 and other bills, Assistant Attorney General William R. Wilson testified that H.R. 16699 had been drafted to protect "any property used for business purposes" to the extent permitted by the Commerce Clause, but that it would not apply to "private homes under normal use." *Explosives Control Hearings*, *supra*, at 37, 56. "The reason, of course, for not protecting" against the bombing of private homes, Wilson explained, "is the basic Federal jurisdiction of interstate commerce." *Id.* at 74.

Several witnesses in the hearings expressed concern that the "business purposes" limitation in H.R. 16699 would bar its application to the bombing of public buildings such as police stations, universities, courthouses, and churches. See, *e.g.*, *Explosives Control Hearings*, *supra*, at 33 (Rep. McCulloch); *id.* at 56 (Rep. Rodino); *id.* at 73 (Rep. Polk); *id.* at 79 (Rep. Smith). Accordingly, the limitation was omitted. See *Russell* v. *United States*, 471 U.S. 858, 860 & n.7 (1985).

But any suggestion that removing the limitation to "business purposes" would bring private residences within the statute's scope was greeted with skepticism. Representative Celler, Chairman of the House Judiciary Committee, suggested that Congress did not have "the power to broaden [a federal bombing statute] to cover a private dwelling * * * under the interstate commerce clause of the Constitution." *Explosives Control Hearings*, *supra*, at 300. When Representative Wylie proposed that Congress make findings that "the bombing of a private dwelling would affect interstate commerce," Chairman Celler questioned whether this would be sufficient to support an exercise of the commerce power. *Id.* at 300-301. Ultimately, no such findings were made, and the bill was not amended to cover bombing of private residences.[1]

In fact, the bill (and Title XI as enacted) repealed a prior statutory provision that purported to prohibit the bombing of private homes. Under that law, explosives used to bomb a "property used for * * * residential * * * objectives" were presumed to have traveled in interstate or foreign commerce. 18 U.S.C. § 837(c) (1960) (repealed by Pub. L. No. 91-452, § 1106(b), 84 Stat. 956 (1970)). The provision was slated for repeal precisely because of concerns that Congress lacked the authority to prohibit the bombing "of a private home." 116 CONG. REC. 35,359 (Chairman Celler); see also *Explosives*

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[1] In the committee debate over H.R. 16699 and other bills, Representative Cramer argued that Congress could punish the bombing of a private home because "any explosive used [for destructive purposes] has to emanate from interstate commerce." *Explosives Control Hearings*, *supra*, at 304-305. Unlike other provisions of Title XI, which regulated explosives transported or received in interstate commerce, see Pub. L. No. 91-452, § 1102(a), 84 Stat. 956 (1970) (codified at 18 U.S.C. § 844(d)), Section 844(i) as enacted did not regulate explosives that had been in interstate commerce but instead relied on a connection between the use of the subject property and interstate commerce as the basis for federal regulation.

Control Hearings, *supra*, at 37 (Assistant Attorney General Wilson).

H.R. 16699 was reported out of the House Judiciary Committee as part of S. 30, the Organized Crime Control Act of 1970. The committee report did not mention private residences, but described Section 844(i) as "a very broad provision covering substantially all business property." H.R. REP. NO. 91-1549, at 70.

During floor debate over S. 30, Representative Hungate asked whether Section 844(i) would criminalize bombing of a private residence. 116 CONG. REC. 35,359. Chairman Celler responded that "the mere bombing of a private home even under this bill would not be covered because of the question whether the Congress would have the authority under the Constitution." *Ibid.* Representative Hungate offered an amendment that was intended to reach bombings of all property by enacting a rebuttable presumption that the explosives used had traveled in interstate commerce. *Id.* at 35,319. The amendment failed, however, and the bill was passed after only brief additional debate. *Id.* at 35,363-35,364. The Senate subsequently passed S. 30, with no mention of private residences. See *id.* at 36,296.

2. As originally enacted, Section 844(i) prohibited only the destruction or attempted destruction of property by means of "an explosive," and did not apply to arson generally. This limitation caused problems in practical application. Accordingly, Congress enacted the Anti-Arson Act of 1982, which amended various provisions of Title 18, including Section 844(i), to apply to arson or attempted arson committed "by means of fire or an explosive." H.R. REP. NO. 97-678, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2631, 2631.

"The jurisdictional circumstances enumerated in * * * section 844 * * * remain[ed] unchanged" by the 1982 amendment. *Id.* at 1. Representative Rodino, Chairman of the House Judiciary Committee and co-sponsor of the bill, assured his

colleagues that it was "***not*** intended to expand Federal jurisdiction over arson offenses generally." 128 CONG. REC. 18,816 (1982) (emphasis added).

B. Factual Background

On February 23, 1998, petitioner Dewey Jones visited the Fort Wayne, Indiana, residence of his cousin, James Walker. See Tr. 35-36, 116-117 (June 17, 1998). Jones earlier had telephoned the house in an unsuccessful effort to speak to Walker. *Id.* at 112-114. Before seeking out Walker in person, Jones purchased a large bottle of beer at a Fort Wayne liquor store, then, after emptying the bottle, filled it with gasoline at a nearby service station. *Id.* at 35-36.

When Jones appeared at the Walker residence, he encountered Walker's wife, Lisa; again, Walker was not home. Tr. 36, 116-117, 159 (June 17, 1998). After telling Mrs. Walker, "I don't have nothing against you or your kids, this is between me and him [*i.e.*, Walker], but he is avoiding me," Jones threw a lit Molotov cocktail into the living room of the Walker residence, causing fire damage. *Id.* at 116-117. He escaped, briefly, in a Ford Explorer driven by another cousin, Jermaine Gist. *Id.* at 117, 147-150.

At first, the Fort Wayne police and fire departments investigated the arson. Tr. 33, 50 (June 17, 1998). The fire department notified the federal Bureau of Alcohol, Tobacco, and Firearms, however, and the BATF took over the investigation. *Id.* at 50.

C. Proceedings Below

1. On March 25, 1998, a federal grand jury returned a three-count indictment. J.A. 2-3. Jones and Gist were charged with arson in violation of 18 U.S.C. § 844(i), and using a destructive device during and in relation to a crime of violence punishable as a federal offense (*i.e.*, the arson) in violation of 18 U.S.C. § 924(c). Jones was also charged with making an illegal destructive device in violation of 26 U.S.C. § 5861(f).

Jones and Gist moved to dismiss the count charging a violation of Section 844(i) for want of a sufficient connection to interstate commerce. J.A. 4-5. The district court denied the motions, J.A. 4-7, and the case proceeded to trial.

2. At trial, the parties stipulated that Jones had thrown a Molotov cocktail through the window of the Walker residence and that the Molotov cocktail was an "explosive" within the meaning of 18 U.S.C. § 844(i) and a "firearm" within the meaning of 18 U.S.C. § 924(c) and 26 U.S.C. § 5861(f). J.A. 8. Accordingly, the principal issue for the jury was whether the Walker residence was "used in interstate or foreign commerce or in an activity affecting interstate or foreign commerce" as necessary to satisfy the jurisdictional element of Section 844(i).

The government presented no evidence that the Walkers conducted any business in their house, and the government did not claim that the Walker residence was used "in interstate commerce." See J.A. 22. Instead, the government contended that three pieces of evidence showed that the Walker home was used in an "activity affecting interstate commerce" within the meaning of Section 844(i).

First, an out-of-state company, Midland Mortgage of Oklahoma City, Oklahoma, held a mortgage on the Walker residence. J.A. 13-14, 17. A witness from the mortgage company testified, however, that the company suffered no loss as a result of the fire. J.A. 14. Second, natural gas was supplied to the Walker residence by the Northern Indiana Public Service Company, an in-state utility company that purchased its natural gas from "field zones" in Texas, Louisiana, the Rocky Mountains, and elsewhere. J.A. 15-16, 17-18. There was no evidence, however, that the supply of natural gas to the Walker residence was interrupted as a result of the fire. Cf. Tr. 87-99 (June 17, 1998). Third, the Walker residence was insured by a company with an out-of-state headquarters, which paid the Walkers' insurance claim for damage resulting from the fire with a draft from an out-of-state bank. J.A. 8-10, 17. The

insurer had approximately 20 employee agents in Fort Wayne, Indiana, however, and the Walkers' insurance claim was settled by an employee claims adjuster who had authority to settle claims only in Fort Wayne. J.A. 8-9, 11.

3. Before the case was submitted to the jury, Jones moved for acquittal on the Section 844(i) count, again contending that the evidence was insufficient to show that the Walker property was used in interstate commerce or in any activity affecting interstate commerce. The district court denied the motion. Tr. 163-165, 177-179 (June 17, 1998).[2] Jones also objected to the government's proposed jury instruction on the jurisdictional element of Section 844(i), which provided that "to show that the real property was used in activity affecting interstate commerce, the government need only establish a minimal connection between the real property at issue and some aspect of interstate commerce." J.A. 18. The district court overruled the objection and gave the government's proposed instruction. *Id.* at 20-22.

4. The jury convicted Jones on all three counts, and the district court denied Jones' post-verdict motion for a judgment of acquittal on the Section 844(i) count and the count under 18 U.S.C. § 924(c).[3] J.A. 23-28. Following Seventh Circuit precedent, the district court held that the government was required to show only "a slight effect on interstate commerce" under Section 844(i). *Id.* at 27 (internal quotation marks omitted).

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[2] The district court granted Gist's motion for a judgment of acquittal on other grounds. See Tr. 165-167, 173-175 (June 17, 1998).

[3] The Section 924(c) count charged Jones with using and carrying a destructive device "during and in relation to a crime of violence for which [he] may be prosecuted in a court of the United States, arson in violation of 18 U.S.C. § 844(i)." See J.A. 2-3. An element of the Section 924(c) offense is an underlying crime of violence "for which the person may be prosecuted in a court of the United States." See *United States* v. *Rodriguez-Moreno*, 119 S. Ct. 1239, 1243 (1999). If the evidence is insufficient to support Jones' conviction under Section 844(i), it is insufficient to support the conviction under Section 924(c).

Under that test, the district court concluded, "the natural gas connection alone suffices to supply the interstate commerce element." *Id.* at 26.

Jones was sentenced to 35 years in prison, over the objection of his victim, Walker, that the sentence was far more severe than the sentence Jones would have received in state court. See J.A. 30-31, 38; Tr. 18-19 (Aug. 26, 1998). The district court agreed that the sentence, which was mandated by statutory minima, was "probably * * * excessive." *Id.* at 21.

5. The Seventh Circuit affirmed. J.A. 44. The court of appeals took for granted that the statute was satisfied by "proof of a slight effect" on interstate commerce, but considered whether application of the statute was constitutional in light of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). J.A. 40-41. The Seventh Circuit concluded that, under *Lopez*, Section 844(i) could reach only activities that "substantially affect commerce." *Id.* at 41.

The court of appeals then considered whether that standard had been met. The court acknowledged that the interstate connections proven by the government — out-of-state natural gas, insurance, and mortgage — "are pretty slight for a single building" and "don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." J.A. 41. The court nonetheless found that the statute was constitutionally applied.

First, the Seventh Circuit observed that "the residential housing industry is interstate in character." J.A. 42. The court explained that "[g]oods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of these." *Ibid.* The court of appeals concluded that this connection between interstate commerce and residential real estate *in toto* was sufficient to render application of Section 844(i) constitutional in this case. *Id.* at 42-43.

Second, taking a different approach, the Seventh Circuit pondered "whether 'arson of buildings' or even 'arson of residences' substantially affects commerce," and concluded that "the answer still must be yes." J.A. 43. The court considered the damage caused by all such arson taken together, and found that "[i]f even a small fraction of the loss is covered by interstate insurance markets, the effect is 'substantial.'" *Ibid.* In addition, the court noted, arson of residential properties "affect[] gas, electric, and telephone service, require[] the occupants to stay at hotels while repairs [a]re completed (a sure sign of interstate commerce * * *), [lead] friends and loved ones to travel from other states to give comfort to the victims, and so on." *Id.* at 43-44. These collective effects, the court concluded, in tandem with "proof of a slight connection between the particular arson and interstate commerce," were sufficient to permit application of Section 844(i). *Id.* at 44.

INTRODUCTION AND SUMMARY OF ARGUMENT

The very idea that Congress might enact a general, nationwide, federal criminal law prohibiting arson within the local jurisdiction of the States would have shocked the Framers of the Constitution. Arson is one of the oldest crimes, and real property is quintessentially local. The Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States* v. *Lopez*, 514 U.S. 549, 566 (1995). Rather, "[t]he Constitution creates a Federal Government of enumerated powers," *id.* at 552, and the "enumeration principle" necessarily "presupposes something not enumerated." *Id.* at 553 (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)).

The Commerce Clause does not override these limits. The grant of federal authority to "regulate Commerce * * * among the several States" is not cryptic short-hand for unlimited power that, through a generalized analysis of the economic effects of human behavior, can reach all or nearly all intrastate conduct. To the contrary, Congress simply may not "use a relatively

trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez*, 514 U.S. at 558 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). If a federal commerce regulation goes beyond what is actually in interstate commerce, it can reach only activity that "***substantially*** affects" interstate commerce. *Lopez*, 514 U.S. at 559 (emphasis added). Congress oversteps constitutional limits when it regulates an intrastate activity based on "effects upon interstate commerce so indirect and remote that to embrace them * * * would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 557 (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

These principles necessarily govern interpretation of a statute that invokes the commerce power to regulate intrastate activity. When some applications of such a statute might exceed the limits of that power, the statute should be construed to avoid constitutional doubt unless the saving "construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (collecting cases). That rule is reinforced where one construction of the statute would "define as a federal crime conduct readily denounced as criminal by the States." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). In such cases, basic concepts of American federalism require that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" by federalizing wholly local crime. *Lopez*, 514 U.S. at 562 (quoting *Bass*, 404 U.S. at 349). In the absence of such a clear statement, the rule of lenity provides an additional reason to interpret Section 844(i) to exclude arson of private residences.

1. Application of these settled principles removes petitioner's arson from the scope of Section 844(i). That provision prohibits arson of "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." It is doubtful, at best, that the power to "regulate

Commerce * * * among the several States" includes the power to prohibit the damage or destruction of a private residence in which no commercial activity takes place. The destruction of property by fire or explosives is not an interstate act and is neither commerce nor commercial. Thus, the commerce power does not suggest authority to regulate arson generally. As Congress recognized, Section 844(i) can be constitutional, if at all, only through the operation of its jurisdictional limitation to property that is "used in interstate * * * commerce or in any activity affecting interstate * * * commerce."

But that jurisdictional limitation can render Section 844(i) constitutional only if it accurately separates conduct that is subject to the commerce power from conduct that is not. Arson is not sufficiently related to interstate commerce as to afford Congress the power to regulate arson in all its manifestations; the mere recitation of a link to commerce does not cure the want of authority if the purported limitation may be satisfied by insubstantial factors. Congress cannot expand its commerce power by including sham jurisdictional elements in statutes that accomplish plenary regulation of noncommercial conduct.

There is no reason to interpret the jurisdictional element of Section 844(i) to be toothless, and thus to permit applications of the statute that likely violate the Constitution. The normal meaning of the terms of the statute weighs heavily against such a gloss. A "property" is "used in an[] activity affecting interstate * * * commerce" only when it is used instrumentally for a commercial (though not necessarily for-profit) purpose. Passive receipt for end-use of interstate utilities, or the mere existence of interstate loans and insurance, are not "uses" of the affected property, nor are such relationships "activities affecting interstate * * * commerce." Such "activities" must be commercial, at least in a broad sense. Moreover, in light of the function of the jurisdictional element in ensuring that Section 844(i) is applied constitutionally — and thus in limiting its application to intrastate activities that substantially affect commerce — the "activities" that subject property to Section

844(i) should be confined to those that substantially affect interstate commerce. That further compels an interpretation of Section 844(i) that excludes private residences from its scope.

The legislative history confirms that Congress did not intend to prohibit the arson of private residences. Indeed, Congress repealed a provision of prior law that purported to do so, and declined to follow the suggestions of two members that Section 844(i) be drafted to cover residences, precisely because of doubt that the Constitution permitted what would amount to plenary regulation of arson.

2. If, however, this Court concludes that "property used in an activity affecting interstate * * * commerce" ***must*** include a private residence where no commercial activity takes place — or must include any structure that receives utility service from an ultimately interstate supply, that has been purchased using funds from an interstate lender, and that has been insured with an interstate insurer — the application of Section 844(i) to this case exceeds the limits of the commerce power. Section 844(i) constitutionally may be applied only to arson that substantially affect interstate commerce. The connections between interstate commerce and the arson here are too thin.

It cannot seriously be contended that our federalism permits Congress to regulate all arson, or all theft, or all murder, based on the inherent significance of those common state crimes to interstate commerce. But such regulation would be permitted if the government and the Seventh Circuit are correct that a constitutionally substantial effect on interstate commerce may be shown by adding together the nationwide financial impact of any intrastate activity. The government and the court of appeals relied on this application of the aggregation device to contend that the nexus between a particular arson and interstate commerce need not be substantial in order to pass constitutional muster.

This Court has limited its use of the aggregation principle to commercial activities. It is not surprising that a power to

regulate ***commerce*** reaches ***commercial*** activities far more easily than noncommercial ones. Only when the ***qualitative*** effects on interstate commerce of regulated conduct are substantial does the aggregation device permit the conduct's ***quantitative*** effects on interstate commerce to be added together, so as to bring within federal jurisdiction incidences of that conduct that have minimal impact on their own.

The distinction between commercial and noncommercial activities reflects the origin of this Court's approval of federal regulation of intrastate activity that is not interstate commerce but substantially affects it. An exercise of the commerce power based on the substantial effects of the regulated activity depends on the operation of the Necessary and Proper Clause in conjunction with the Commerce Clause. Using aggregation of effects as a way to bring an entire activity within the commerce power — so that regulation may reach individual instances of the activity that have insubstantial effects standing alone — is necessary and appropriate in only two situations: when interstate activities are so commingled with intrastate activities that regulation of one cannot be effective without regulation of the other, and when an intrastate activity is closely related to interstate commerce, and threatens an aspect of it, but is beyond effective regulation by individual States. A noncommercial activity like arson does not have the close relation with interstate commerce needed to invoke the aggregation device under either rationale.

Additional considerations preclude permitting federal regulation of arson without requiring proof of a substantial effect on commerce through the jurisdictional element. The regulated conduct, arson, is the very model of a traditional state crime. It is the type of felony that long has been acknowledged to be a concern of the States rather than the federal government. And the application of the aggregation principle here proceeds under a rationale that cannot logically stop short of conferring general power upon the federal government to regulate all local crime based on its aggregate economic effects. Such conver-

sion of the Commerce Clause into a grant of plenary police power not only disturbs the state-federal balance, but renders meaningless the distinct and limited powers to combat crime that are enumerated in the Constitution.

Once it is clear that the aggregation principle does not excuse case-by-case demonstration of substantial effects on interstate commerce before Section 844(i) may be applied, it is equally clear that the statute may not be constitutionally applied to the arson in this case. The Seventh Circuit recognized that the asserted links to interstate commerce here were not substantial. The basic incidents of home ownership and household support do not substantially affect interstate commerce, and thus cannot provide the nexus to interstate commerce needed to bring petitioner's arson within the constitutional scope of Section 844(i). Even if aggregation may play some role in lightening the load of the jurisdictional element, the connections between regulated conduct and interstate commerce nonetheless must be less speculative and attenuated than the trivial particulars relied on in this case.

ARGUMENT

I. SECTION 844(i) DOES NOT APPLY TO ARSON OF A PRIVATE RESIDENCE

That Congress could exert nationwide power to prohibit arson is not immediately apparent from the terms of the grant of authority "[t]o regulate Commerce * * * among the several States." The Congress that enacted Section 844(i) certainly did not think so. To the contrary, Congress recognized that something more was needed to render an arson prohibition constitutional, and so included a jurisdictional element that "would ensure, through case-by-case inquiry," that particular instances of the regulated activity ***did*** fall within the commerce power. See *Lopez*, 514 U.S. at 561-562. That jurisdictional provision does not embrace private residences.

A. Section 844(i) May Not Be Interpreted To Apply To Arson Of A Private Residence In The Absence Of Clear And Definite Congressional Intent

As this Court acknowledged in granting certiorari, statutes should be interpreted where possible to avoid "constitutionally doubtful constructions." See J.A. 45 (citing *DeBartolo*, 485 U.S. at 575). Reflecting the "prudential concern that constitutional issues not be needlessly confronted," this principle applies not only where a particular interpretation of a statute clearly would violate the Constitution, but also where the interpretation would raise serious questions about the statute's validity. *DeBartolo*, 485 U.S. at 575; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961). When one reasonable construction of a statute avoids the constitutional concerns raised by an alternate interpretation, only the clearest indication of congressional intent can support adoption of the constitutionally questionable reading. *DeBartolo*, 485 U.S. at 577.

The government has acknowledged that any interpretation of Section 844(i) that would reach the conduct in this case raises constitutional doubts. In resisting certioriari, the government stated that "the Court's decision in [*United States* v. *Morrison*, No. 99-5, and *Brzonkala* v. *Morrison*, No. 99-29] may affect the proper resolution of the question" whether Congress has the power under the Commerce Clause to punish arson of a private residence, and thus urged unsuccessfully that "the petition should be held pending this Court's decision" in those cases. U.S. Br. (Opp.) 4-5; see *id.* at 11-12. Pending decisions on the scope of the commerce power could not affect the disposition of this case unless serious constitutional questions about that power were present here. The government's apprehension about the constitutionality of the application of Section 844(i) in this case was well-founded. As we explain below, application of Section 844(i) to arson of a private residence would violate the constitutional limits on congressional power under the Commerce Clause. That

constitutional issue can and should be avoided here, where the everyday meaning of the jurisdictional element excludes private residences from the statute's scope.

There is another, related reason to interpret Section 844(i) as a limited regulation of specific arson, rather than a general assertion of jurisdiction over the burning of all or nearly all property. "When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3 (internal quotation marks omitted). This Court must reject a statutory construction that "renders traditionally local criminal conduct a matter of federal enforcement and would also involve a substantial extension of federal police resources" unless, by clear statement, Congress has compelled the interpretation. *Bass*, 404 U.S. at 350-352. Thus, where a statute is amenable to two interpretations, the broader of which would extend federal jurisdiction over a whole range of conduct that has been "traditionally subject to state regulation," the narrower construction should be adopted unless a contrary intent is unmistakably clear. *Rewis* v. *United States*, 401 U.S. 808, 812 (1971).

The decision below would make arson of every occupied building a federal crime, subject to federal investigation and prosecution. Yet real property is surpassingly local, and residential arson is among the most firmly rooted state crimes: it has been criminalized by the States "[f]rom the earliest colonial days," and is a felony under the laws of all fifty States. See Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 AM. CRIM. L. REV. 151, 151 (1985); Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 342-344 & nn.221, 223-262 (1986). It thus was exactly the kind of crime that Chief Justice Marshall and this Court had in mind in holding it "clear, that congress cannot punish felonies generally." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821). See *Lopez*, 514 U.S. at 596 (Thomas, J., concurring).

These principles counsel restraint in interpreting Section 844(i), so that the statute is not unnecessarily applied to extend beyond the scope that can reasonably be justified as a regulation for protection of interstate commerce. The text, structure, and history of the statute support (indeed, compel) an interpretation that confines the word "used" to a meaning consonant with normal speech, and that restricts "activity affecting" interstate commerce to commercial pursuits and similar activities. There is absolutely ***no*** indication in the legislative sources — much less the "requisite 'clearest indication,'" *DeBartolo*, 485 U.S. at 577 (quoting *NLRB* v. *Drivers Local Union No. 639*, 362 U.S. 274, 284 (1960)) — that Congress intended Section 844(i) to federalize arson of private residences. This Court therefore need not, and should not, construe that statute to reach that far.

Indeed, even if the text and legislative history of Section 844(i) were sufficiently ambiguous to permit an interpretation of the statute that would federalize the arson of a private residence, the rule of lenity would require that the ambiguity be resolved in Jones's favor. See *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987). A reasonable person would not apprehend that the arson of a private family home involved a "property used * * * in any activity affecting interstate or foreign commerce." See pp. 17-20, *infra*; see also *Bass*, 404 U.S. at 348-349 & n.15.

B. The Text Of Section 844(i) Does Not Manifest Congressional Intent To Federalize Arson Of A Private Residence

1. The only evidence proffered to satisfy the jurisdictional element of Section 844(i) showed that "the owner of the residence purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer." J.A. 40-41. But the "ordinary and natural meaning" of "use[] in an activity" is

not satisfied by "use" of one's house for the receipt of natural gas, a mortgage, or insurance. See *United States* v. *Mennuti*, 639 F.2d 107, 110 (2d Cir. 1981) (Friendly, J.). Nor are the maintenance of a mortgage and homeowners' insurance, and the receipt of natural gas, activities in which the property is "used" in the normal, active, implementing sense. See *United States* v. *Ryan*, 41 F.3d 361, 369 (8th Cir. 1994) (en banc) (Arnold, C.J., dissenting), cert. denied, 514 U.S. 1082 (1995). The language of Section 844(i) does not support such strained constructions, and they should be rejected.

The interpretation of a statute begins, of course, with its text. *E.g.*, *Bailey* v. *United States*, 516 U.S. 137, 144 (1995). Section 844(i) purports to reach only the actual or attempted damage or destruction of property that is "***used*** in interstate or foreign commerce or ***in any activity affecting interstate or foreign commerce***" (emphasis added). The government must prove the stated nexus with interstate commerce as a separate element of the crime. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 218 (1960); *United States* v. *Latouf*, 132 F.3d 320, 325 (6th Cir. 1997), cert. denied, 523 U.S. 1101 (1998).

The phrase "used * * * in any activity affecting interstate or foreign commerce" must be construed in accord with its ordinary and natural meaning, see *Bailey*, 516 U.S. at 145, bearing in mind that "familiar legal expressions" should be understood in their "familiar legal sense." *Bradley* v. *United States*, 410 U.S. 605, 609 (1973). Accordingly, the text of Section 844(i) invokes an inquiry that first determines how the property was "used" — *i.e.*, its function — and then asks whether (and how) that function affects interstate commerce. See Cunningham & Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 WASH. U. L.Q. 1159, 1176 (1995); Egan, Note, *The Jurisdictional Element of 18 U.S.C. § 844(i), A Federal Criminal Commerce Clause Statute*, 48 WASH. U.J. URB. & CONTEMP. L. 183, 209 (1995).

Because the statutory terms echo statements defining the limits of Congress's power to regulate under the Commerce Clause, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 118 (1941), the ordinary and natural meaning of the jurisdictional element encompasses property that is actively employed in a pursuit that affects interstate commerce in a constitutionally significant way, that is, in a pursuit that "substantially affects" interstate commerce. *Lopez*, 514 U.S. at 559. Thus, one "uses" a residential property to live in or to rent out for profit. One "uses" a business property to conduct a commercial enterprise. One "uses" a warehouse to store inventory. One "uses" a car to drive to and from work. If these pursuits substantially affect interstate commerce, then arson of the property falls within the statute.

The normal meaning of each statutory term supports this common-sense reading. The word "use" connotes the active "application or employment of something," especially its employment "for the purpose for which it is adapted." BLACK'S LAW DICTIONARY 1540 (7th ed. 1999); see also 19 OXFORD ENGLISH DICTIONARY 353, 354 (2d ed. 1989) (defining "use" as "to employ for a certain end or purpose," "to employ or make use of (an article, etc.) esp. for a profitable end or purpose," and "to employ * * * in some function or capacity, esp. for an advantageous end"). To "use" a structure implies some "action and implementation," *Bailey*, 516 U.S. at 145, directed toward a purpose. Similarly, ordinary meanings of "activity" include a "specific action or pursuit," WEBSTER'S NEW WORLD DICTIONARY 14 (3d ed. 1988); a "specified pursuit," AMERICAN HERITAGE DICTIONARY 18 (3d ed. 1992), or "[a]n occupation or pursuit in which a person is active," BLACK'S LAW DICTIONARY 33 (6th ed. 1990).

These definitions suggest affirmative and goal-oriented employment of property to perform a function, not the passive receipt of goods and services related to the property, and colloquial speech confirms that definition. When asked if she had "used" her empty vacation home over the weekend, a

normal person would not reply, "Yes, it received natural gas." And one does not refer to "using" an automobile to store a tank of gasoline. No one says she "uses" her house to carry the mortgage. And no one speaking normally would refer to "using" a home to insure it.

As Judge Friendly observed, "[t]o the ordinary mind, the destruction of * * * private dwellings would not constitute the destruction of buildings used in * * * any activity affecting interstate commerce." *Mennuti*, 639 F.2d at 109. That should be the end of the matter.

2. Section 844(i) incorporates the well-worn phrase, "activity [or activities] affecting interstate * * * commerce." Before enacting that Section in 1970, Congress had included the same or similar jurisdictional limitations in many other statutes to support federal regulation of intrastate conduct. Those usages provide persuasive context for construing the same limiting terms in Section 844(i). See, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); *American Airlines* v. *North American Airlines*, 351 U.S. 79, 82 (1956); *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 131-132 (1943). Indeed, the committee report expressly invoked similar statutes as models for Section 844(i). See H.R. REP. NO. 91-1549, at 70 (referencing the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* ("LMRA"), the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.* ("LMRDA"), and the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*).

When Congress regulated "activities affecting interstate commerce" before 1970, the activities being regulated were commercial or business-related. Federal labor law — which was expressly invoked as a model for Section 844(i) — prohibits unfair labor practices in "an industry or activity affecting commerce." 29 U.S.C. § 187(a); see also *id.* §§ 402(c), 504(a)(3). In the contemplation of the LMRA, it was "employer[s]" "whose activities affect commerce" (*id.* § 185(b)). And when the LMRA defined an "industry affecting

commerce," the term included either an "industry or activity" that was "in commerce" (*i.e.*, in interstate "trade, traffic, commerce, transportation, or communication," *id.* § 152(6)), or one in which a labor dispute might tend to burden or obstruct interstate commerce or its free flow. *Id.* § 142; see also *id.* § 402(a). There is no question that these provisions reach only businesses and similar entities. Indeed, only three years before the enactment of Section 844(i), the Age Discrimination in Employment Act borrowed from the labor laws a definition of "industry affecting commerce" that included any "activity, business, or industry" with a defined nexus to interstate commerce. 29 U.S.C. § 630(h) (referencing LMRDA, *id.* § 401 *et seq.*). Another model for the jurisdictional provision of Section 844(i), the employment provisions of the Civil Rights Act of 1964, also adopted the labor law usage of "activity * * * affecting commerce" as a type of "industry affecting commerce." 42 U.S.C. § 2000e(h).

Other well-known statutes used some version of the phrase "activity affecting interstate commerce"; all of them did so in a way that made clear that the only "activity" that was contemplated was ***commercial*** activity (which might include non-profit enterprises). Thus, the antitrust laws limiting mergers and acquisitions speak in terms of the acquisition of one "person engaged in commerce or in any activity affecting commerce" by another. 15 U.S.C. § 18. The similarly worded pre-merger notification requirement, enacted shortly after Section 844(i), contained an exception for acquisitions or transfers of "goods, or realty * * * in the ordinary course of business" — presuming that "business" is the "ordinary course" for a person engaged in "any activity affecting commerce." 15 U.S.C. § 18a(c)(1). Similarly, the Racketeer-Influenced and Corrupt Organizations Act of 1970, enacted together with Section 844(i), referred to the "activities" of an "enterprise" "which affect[] interstate or foreign commerce," 18 U.S.C. § 1962(a)-(c); the statute made clear that an "enterprise" was a collective and purposeful undertaking, though not necessarily

for economic ends. See *National Organization for Women* v. *Scheidler*, 510 U.S. 249, 257-262 (1994). These and other prior, contemporaneous, and subsequent usages of "activities affecting interstate commerce" provide compelling evidence that Section 844(i) reflects a similar understanding of those common statutory terms to mean purposeful business or commercial activities.[4]

The statutory language arises from this Court's approval of federal efforts to regulate "activities intrastate which so affect interstate commerce * * * as to make regulation of them appropriate." *Darby*, 312 U.S. at 118; see also, *e.g.*, *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Wickard* v. *Filburn*, 317 U.S. 111, 124 (1942). In considering what intrastate activities affected interstate commerce in this way, however, this Court addressed only intrastate business conduct with interstate consequences. See, *e.g.*, *Wrightwood Dairy*, *supra* (sale of milk); *Darby*, *supra* (lumber mill); *Wickard*, *supra* (production and consumption of wheat, an interstate commodity).

3. "[T]he meaning of statutory language," of course, "depends on context." *Bailey*, 516 U.S. at 145 (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)). The structure of the

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[4] See, *e.g.*, 15 U.S.C. § 79a(c) (public utility holding companies are engaged in "activities which directly affect or burden interstate commerce"); 15 U.S.C. § 1173(a)(1) (regulating "activities" of "the business of manufacturing gambling devices" if they "affect interstate * * * commerce"); 17 U.S.C. § 910(a) (prohibiting violation of intellectual property rights of semiconductor chip products "by conduct * * * affecting commerce"); 18 U.S.C. § 513(c)(4) (defining "organization" as any "corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association * * * the activities of which affect interstate" commerce); 18 U.S.C. § 668(a)(1) (defining "museum" as institution "the activities of which affect interstate" commerce); 18 U.S.C. § 1033(a) (prohibiting fraudulent conduct by "persons engaged in the business of insurance whose activities affect interstate commerce"); 18 U.S.C. § 1510(d)(1) (prohibiting obstruction of justice by person "engaged in the business of insurance whose activities affect interstate commerce").

original Section 844 as a whole confirms that "use[] * * * in an activity affecting interstate * * * commerce" denotes more than an end-user's passive receipt of interstate goods or services.

If the mere receipt of interstate utilities or other commodities constituted the use of property in an activity affecting interstate commerce, another subsection of the original Section 844 would have been entirely superfluous. Section 844 originally prohibited the damage or destruction by explosives of ***two*** different types of property. Section 844(i) covered property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," while Section 844(f) originally covered property "owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance." See Pub. L. No. 91-452, § 1102(a), 84 Stat. 956 (1970) (codified at 18 U.S.C. § 844(f) (1970)). If Section 844(i) covered any property that receives utilities or a *de minimis* amount of goods or services interstate, there would have been no need for Congress also to prohibit damage or destruction of a property used by the federal government or receiving federal funds. The broad interpretation of property "used * * * in any activity affecting interstate or foreign commerce" applied by the Seventh Circuit in this case would improperly render Section 844(f), as enacted, a "practical nullity." *United Savings Ass'n* v. *Timbers Associates, Ltd.*, 484 U.S. 365, 375 (1988); *Bailey*, 516 U.S. at 147-148; *Ratzlaf* v. *United States*, 510 U.S. 135, 140-141 (1994).

4. The jurisdictional element in Section 844(i) was intended to separate out buildings and other property with sufficient connections to interstate commerce to make them permissible objects of federal regulation. That, of course, requires limiting "activities affecting interstate * * * commerce" to those that "substantially affect" interstate commerce. See *Lopez*, 514 U.S. at 559. Likewise, to draw a rational distinction between those properties that substantially affect commerce and those that do not, the property must be actively

and "currently used." *Mennuti*, 639 F.2d at 113. A property used for one purpose today may be used for another, or none at all, tomorrow. "Residential" garages may house embryonic businesses, and "commercial" structures may be converted to purely private residential use, like the former shops that now are Georgetown living rooms. By contrast, to interpret Section 844(i) to reach private residences or other structures based solely on the receipt of utilities or interstate commodities, or the maintenance of insurance or financing, would have the practical effect of eliminating the interstate commerce element of the offense — and would have done so equally in 1970 — given the reality that any property in the modern world has at least some *de minimis* link to interstate commerce.

Every State except Alaska imports at least some natural gas from out-of-state sources, and there is no way to determine the source of gas that has been transported to a consumer. See U.S. DEP'T OF ENERGY, ENERGY INFORMATION ADMIN., NATURAL GAS ANNUAL 1997, at 22-27 (1998). "No State relies solely on its own resources" for electrical power. *FERC* v. *Mississippi*, 456 U.S. 742, 757 (1982). The prevalence of regional and national insurers, and the active market in the sale of mortgages, makes interstate contacts of that kind inevitable. Any property with telephone service receives interstate communications services. The list of interstate goods and services that are provided to the typical private home — junk mail, cable television, parcel delivery — defies enumeration.

The government and some federal courts are all too willing to rely on attenuated links of this kind to establish the interstate commerce element of Section 844(i). This was not the first time the government has contended that a building was "used" in the "activity" of receiving natural gas or electricity.[5] Nor is

[5] See, *e.g.*, *United States* v. *Melina*, 101 F.3d 567, 572 (8th Cir. 1996); *United States* v. *Flaherty*, 76 F.3d 967, 973 (8th Cir. 1996); *United States* v. *Pappadopoulos*, 64 F.3d 522, 525 (9th Cir. 1995); *United States* v. *Vogel*, 37 F.3d 1497 (table), 1994 WL 556994, at *8 (4th Cir. Oct. 12, 1994); *United States* v. *Ramey*, 24 F.3d 602, 607 (4th Cir. 1994), cert. denied, 514 U.S. 1103 (1995); *United States* v. *Ryan*, 9 F.3d 660, 666 (8th Cir. 1993), as amended on reh'g, 41 F.3d 361 (1994), cert. denied, 514 U.S. 1082 (1995); *United States* v. *Stillwell*, 900 F.2d 1104, 1106 (7th Cir.), cert. denied, 498 U.S. 838 (1990).

this case the first to rely on a target property's coverage by an out-of-state insurer.[6] The government also has claimed that an automobile was "used in an activity affecting" interstate commerce because it carried a bottle of out-of-state orange juice, see *United States* v. *McGuire*, 178 F.3d 203 (3d Cir. 1999), and that magazine subscriptions delivered to a residence, and the employment of a Chilean housekeeper, helped establish the jurisdictional nexus of Section 844(i). See *United States* v. *Montgomery*, 815 F. Supp. 7, 11 n.6 (D.D.C. 1993).

The absurdity of such interpretations appears even more clearly upon recalling that the jurisdictional element of Section 844(i) applies to arson of personal property as well as real property. If the receipt of utilities, purchase financing by an out-of-state lender, and insurance coverage are sufficient to make a federal crime out of any damage or destruction involving fire or various explosive materials, then a wide range of petty vandalism also violates Section 844(i). Many items of personal property consume interstate utilities, are financed by out-of-state lenders, and are insured through homeowners' policies or credit-card-based purchase replacement policies. Shooting out a television picture tube (gunpowder being an explosive, see 18 U.S.C. § 844(j)) would be a federal crime. The television would be "used in an activity affecting commerce" if it consumed electricity some of which was generated out of state, was purchased using credit financed by an out-of-state bank, and was insured. Similar considerations would federalize damage or destruction of gas barbecue grills or rechargeable electric razors. Like the Seventh Circuit's application of Section 844(i) in this case, these applications are, at

[6] See, *e.g.*, *Vogel*, 1994 WL 556994, at *8; *United States* v. *Moore*, 25 F.3d 1042 (table), 1994 WL 251174, at *3 (4th Cir. June 10, 1994), cert. denied, 514 U.S. 1102 (1995).

best, constitutionally doubtful under the principles enunciated in *Lopez*.

The terms of Section 844(i) certainly do not contemplate such folly, much less compel it. "An evidentiary standard for finding 'use' that is satisfied in almost every case" — the practical effect of the Seventh Circuit's application of the interstate commerce element of Section 844(i) — "does not adhere to the obvious congressional intent," manifested by the plain language of Section 844(i), to require something "more" than simple arson "to trigger the statute's application." *Bailey*, 516 U.S. at 144. To the contrary, by straining to include private residences, the court of appeals effectively excised the jurisdictional element from the statute, and its judgment therefore should be reversed. *Ibid.*; *Ratzlaf*, 510 U.S. at 140-141.

5. This Court's prior analysis of the text of Section 844(i) fully supports interpreting that provision to require more than the mere incidents of homeownership in order to extend federal jurisdiction to arson. In *Russell* v. *United States*, 471 U.S. 858 (1985), the Court, addressing only the construction of Section 844(i) rather than its constitutionality, held that Section 844(i) applied to the arson of a "two-unit apartment building that is used as rental property." *Id.* at 858, 862. The Court explained that the "rental of real estate" — a commercial transaction between landlord and tenant — was an "'activity' that affects commerce" within the meaning of the statute. *Id.* at 862.

Crucially, the Court declined the government's invitation to hold that "the use of out-of-state gas to heat the building petitioner attempted to burn established that it was used in an activity affecting interstate commerce." Brief for the United States at 16, *Russell* v. *United States*, No. 84-495. That had been the rationale of the district court. See 563 F. Supp. 1085, 1086 (N.D. Ill. 1983). But this Court would not go so far. Rather, it rested its decision on an ***active*** employment of the property in a commercial context — as the subject of rental transactions with residential tenants. That emphasis is correct

now as it was then and, unlike some observations in *Russell* that were unnecessary to the statutory holding (see pp. 37-38, *infra*), is consonant with the constitutional analysis in *Lopez*.

C. The Legislative History Of Section 844(i) Does Not Reflect Congressional Intent To Federalize Arson Of A Private Residence

The legislative history of Section 844(i) confirms that the statute does not reach arson of private residences. The committee report described Section 844(i) as "a very broad provision covering substantially all business property." H.R. REP. NO. 91-1549, at 70; see also *Russell*, 471 U.S. at 861.[7] Reaching "substantially" all business property suggests that ***not*** all business property falls with the statute's scope. The Judiciary Committee thus envisioned that even some business property — such as "business" property that was dormant or abandoned — would not be protected by the statute. That, in turn, confirms (in accord with common sense) that even some property that might be characterized in the abstract as "business" property rather than "residential" property is not "***used*** in an activity affecting" interstate commerce within the meaning of Section 844(i). Some property that once was "business" property is no longer "used" at all, or has been converted to private residential use.

Although the Committee broadened the coverage of Section 844(i) in response to concerns about coverage for various types of public buildings, there is no sign that the Committee envisioned that Section 844(i) would encompass private residences. Private residences do not fall within its description of the statute's coverage of "substantially all business property," and were not even mentioned in the Report. The question of federally proscribing the bombing of a private residence arose in both committee and floor debate, but every time the possibility was raised it was rejected. See pp. 2-4, *supra*. Indeed,

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[7] Having quoted this passage, this Court inexplicably dropped the word "substantially" in paraphrasing the legislative history. 471 U.S. at 862.

Chairman Celler stated with unmistakable clarity that "the mere bombing of a private home * * * would not be covered because of the question whether the Congress would have the authority under the Constitution." 116 CONG. REC. 35,359 (1970). This Court need not and should not interpret Section 844(i) to cover private homes "when responsible congressional committees and leaders, in managing a bill, have told Congress that the bill will not reach that which the Act is invoked in this Court to cover." *United States* v. *Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality opinion of Jackson, J.).

Notably, Title XI ***repealed*** a prior statutory provision under which explosives used to bomb a "property used for * * * residential * * * objectives" were presumed to have traveled in interstate or foreign commerce. 18 U.S.C. § 837(c) (1960) (repealed by Pub. L. No. 91-452, § 1106(b), 84 Stat. 956 (1970)). Constitutional concerns motivated the repeal, see p. 3, *supra*, and no reference to "residential" uses or objectives carried over into Section 844(i).

The legislative history is equally clear that the Anti-Arson Act of 1982 did not expand the scope of Section 844(i)'s application to arson of residential properties. Chairman Rodino explained that the amendment was "***not*** intended to expand Federal jurisdiction over arson offenses generally." 128 CONG. REC. 18,816 (1982) (emphasis added).

The legislative history thus shows that Congress enacted Section 844(i) — designed to protect "substantially all business property" — in the belief that the statute did not reach private residences. In light of this clear evidence of congressional intent ***not*** to federalize arson of a private residence, there is no reason for this Court to deprive the words "used * * * in any activity affecting interstate * * * commerce" of their normal, active, instrumental meaning in order to bring such arson within the scope of Section 844(i).

II. APPLICATION OF SECTION 844(i) TO THE ARSON HERE VIOLATES THE COMMERCE CLAUSE

If this Court concludes that Section 844(i) cannot be construed to exclude the arson of a private residence, the Court must then consider whether the application of the statute in this case in fact comes within Congress's power "[t]o regulate Commerce * * * among the several States." It does not.

The commerce power authorizes federal regulation of only three categories of activity. *Lopez*, 514 U.S. at 558. The first category covers "the use of the channels of interstate commerce" and permits Congress to exclude harmful uses (and products) from those channels. *Ibid.* The second category encompasses "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* And the third category includes "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-559.

The government has not contended that application of Section 844(i) to a private residence (or indeed, to most real property) regulates a channel or instrumentality of interstate commerce, see U.S. Br. (Opp.) 6-8, and real property certainly cannot be a thing "in" commerce. Accordingly, as the Seventh Circuit recognized (J.A. 41), the application of Section 844(i) at issue here can be justified, if at all, as a regulation of an "activity that substantially affect[s] interstate commerce."

We explain below that Congress lacks the power to prohibit arson generally, so that the constitutionality of the present application of the statute must depend on satisfaction of a jurisdictional element that appropriately limits the coverage of the statute to particular examples that have the requisite substantial effects. Even if the minimal and attenuated links to interstate commerce relied upon below satisfy the statute as construed by this Court, they do not bring Jones's crime within Congress's commerce power.

A. The Commerce Clause Does Not Authorize General Federal Regulation Of Arson Based On A Crude Aggregation Of The Economic Effects Of That Crime

The Seventh Circuit recognized that the connections between Jones's arson (or the Walker residence) and interstate commerce were insubstantial at best; "pretty slight" overstates the case. See J.A. 40-41. But the Seventh Circuit held that federal law could proscribe Jones's conduct even though that conduct had no substantial relation to interstate commerce. That conclusion flowed from a flawed premise, that arson — and particularly residential arson — is the type of activity that so substantially affects interstate commerce that an individualized inquiry into the nexus with commerce is unnecessary. In effect, by concluding that the federal government could regulate any arson based on the aggregate financial impact of all arson, the Seventh Circuit concluded that the jurisdictional element was largely if not entirely unnecessary. In the view of the court of appeals, a view apparently shared by the government, the jurisdictional element need not be met by factors that establish a substantial effect on interstate commerce.

That is not so. Arson is not the type of conduct that can be aggregated in its effect and then regulated without a substantial jurisdictional nexus. To the contrary, "the *de minimis* character of individual instances arising under [a statute enacted under the commerce power] is of no consequence" — and so will permit federal regulation — ***only*** "where a general regulatory statute bears a substantial relation to commerce." *Lopez*, 514 U.S. at 558 (quoting *Wirtz*, 392 U.S. at 197 n.27). Section 844(i), however, is not "an essential part of" any such "larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity" — *i.e.*, arson — were regulated. *Lopez*, 514 U.S. at 561. Any substantial effect on interstate commerce must appear through the jurisdictional element, or not at all.

1. *"Substantial Effects" On Interstate Commerce Of A Noncommercial Activity Such As Arson Cannot Be Established Through Aggregation*

The Seventh Circuit held that federal regulation could extend to residential arson because such arson, added together, might have a significant aggregate effect on interstate services including natural gas, insurance, and mortgages. J.A. 42-44. The Seventh Circuit's alternative basis for upholding the regulation of residential arson was the interstate "character" of the "residential housing industry," based on homeowners' consumption of such services. J.A. 42.

Under that reasoning, almost any intrastate conduct could be federally regulated by virtue of our universal immersion in a modern economy. But such an "excessive regard for the unifying forces of modern technology" would violate a most fundamental premise of our constitutional federalism: "[t]he interpenetrations of modern society have not wiped out state lines" and do not permit wholesale "inroads upon our federal system." *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 650 (1982) (Frankfurter, J.). The limitless conception of the commerce power expressed by the Seventh Circuit and the government does not accord with this Court's jurisprudence.

a. Congress's authority to regulate interstate commerce itself is plenary, see *Gibbons*, 22 U.S. (9 Wheat.) at 197, but its Commerce Clause authority over intrastate conduct is limited. *Lopez*, 514 U.S. at 557. The commerce power extends only to "those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.* at 555 (quoting *Darby*, 312 U.S. at 118, which cited *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). The only reason that Congress has power, under a grant permitting it to "regulate Commerce * * * among the several States," to "provide for regulation of

activities not themselves interstate commerce, but merely 'affecting' such commerce," is that "in certain fact situations" federal "regulation of purely local and intrastate commerce" may be 'necessary and proper' to prevent injury to interstate commerce." *Polish National Alliance*, 322 U.S. at 652 (Black, J., concurring). See U.S. CONST. art. I, § 8, cl. 18; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 231-232 & n.11 (1948); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584-585 (1985) (O'Connor, J., dissenting); see also 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 812-814 & n.23 (3d ed. 2000); Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 764-769 (1997).

This expanded power does not allow Congress to regulate absolutely anything that might have a financial impact on some thread of interstate commerce. As this Court has recognized, "[t]he 'affecting commerce' test was developed * * * to define the extent of Congress's power over purely intrastate ***commercial*** activities that nonetheless have substantial interstate effects." *United States* v. *Robertson*, 514 U.S. 669, 671 (1995) (emphasis added). Thus, "substantial effects" analysis applies only to "economic activity." *Lopez*, 514 U.S. at 560.

As a "necessary and proper" inquiry suggests, the substantial effect on commerce is a qualitative test of relationship, not a mere adding-up of costs. See 1 L. TRIBE, *supra*, at 819. The "activities that substantially ***affect*** interstate commerce" are "activities having a substantial ***relation*** to interstate commerce." *Lopez*, 514 U.S. at 558-559 (emphasis added).

b. In some circumstances, federal regulation of intrastate activity may be justified on the ground that a class of regulated activities in the aggregate has a substantial effect on interstate commerce, although the effects of a specific instance of conduct are minimal. The aggregation principle means that the "substantial effect" perhaps need not be ***quantitatively*** large in every case so long as ***qualitatively*** the effect is closely connected to interstate commerce and to the regulated activity. But

transparently insubstantial connections with commerce — such as the passive receipt of utility service, or the existence of a mortgage or insurance — will not suffice, no matter what their aggregated dollar value.

Not every type of conduct can be freely aggregated; if it could, the aggregation practice would permit an easy end-run around the "substantial effects" limitation. Just as this Court has limited "substantial effects" analysis to "economic activity," *Lopez*, 514 U.S. at 560, it has limited the use of aggregation to federal "regulation[] of [intrastate] activities that arise out of or are connected with a ***commercial transaction***." *Id.* at 561 (emphasis added); see also 1 L. TRIBE, *supra*, at 820-821. Congress may regulate individual instances of intrastate "economic activity that might, through repetition elsewhere, substantially affect * * * interstate commerce," but it may not rely on the aggregation principle to regulate ***noncommercial*** intrastate conduct that lacks a demonstrably substantial relation to interstate commerce. *Lopez*, 514 U.S. at 567. In order to aggregate the effects on commerce of individual instances of an activity, the instances must be "meaningfully part of some greater whole." *United States* v. *Hickman*, 179 F.3d 230, 232-233 (5th Cir. 1999) (en banc affirmance by an equally divided court) (Higginbotham, J., dissenting), petition for cert. filed, 68 U.S.L.W. 3178 (Sept. 16, 1999) (No. 99-464). And that greater whole, in the context of regulation of interstate commerce, arises from the market significance of intrastate commercial activity.

It makes perfect sense to "view[]" commercial transactions "in the aggregate," *Lopez*, 514 U.S. at 561, as those transactions operate within markets that either are interstate or may be affected by adjacent, interstate markets. Although "a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty," that

uncertainty is a necessary byproduct of constitutional limits on the commerce power. *Id.* at 566.[8]

c. The limitations on the aggregation practice reflect the relation of that practice to the Necessary and Proper Clause. In applying that Clause to the commerce power, this Court has permitted regulation of intrastate conduct under an aggregation theory ***only*** where successful protection of interstate commerce required uniform, nationwide regulation of the intrastate conduct — regulation that no State could provide within its borders alone.

This Court has found this standard satisfied in two, and only two, related sets of circumstances, each of which has involved some form of commercial activity. First, intrastate conduct falls within Congress's authority where interstate and intrastate activities are so "commingled" or interdependent that the effective regulation of the former requires regulation of both. *E.g.*, *North American Co.* v. *SEC*, 327 U.S. 686, 700 (1946); *Wickard*, 317 U.S. at 119, 123-125; *Wrightwood Dairy*, 315 U.S. at 119; *Darby*, 312 U.S. at 121. Arson of private homes and arson in interstate commerce are not so "commingled" or causally interdependent that it is necessary to regulate the former in order to regulate effectively the latter. Effective

[8] "Commercial" activity of course embraces more than mere "commerce," which includes the exchange of property or services and transportation (which is essential to exchange). See *Gibbons*, 22 U.S. (9 Wheat.) at 193. Commercial activity extends to a broader "realm of commerce" (*Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)) that includes a range of incidents to commerce proper, such as the production of products and organization of services for exchange and a wide variety of other activities and relationships that contribute to the pursuit of an interest through the medium of exchange. Commercial activity need not be undertaken on behalf of capital; labor, in organizing to sell its services, engages in a commercial activity that squarely and powerfully affects commerce itself. And commercial activity in this sense need not be for profit; the fund-raising and other enterprises of many groups founded on a common interest of ideology or morality are as commercial as the identical activities motivated by common trade interests or for personal profit.

regulation of arson in interstate commerce requires just that, and no more — it does not require that Congress also federalize arson of private residences or other property that is not actively employed in interstate commerce or in a commercial undertaking that affects interstate commerce.

Intrastate activities may also be regulated if, taken as a class, they bear "such a close and substantial relation" to interstate commerce that their regulation is "essential or appropriate" to protect interstate commerce against injury or disruption, as from unfair competition or a labor stoppage. *Shreveport Rate Cases (Houston, E. & W. Tex. Ry.* v. *United States*), 234 U.S. 342, 351 (1914); see also, *e.g.*, *Darby*, 312 U.S. at 118-119; *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U.S. 453, 466-467 (1938); *Jones & Laughlin*, 301 U.S. at 37. But these cases, too, involved commercial activities. Noncommercial intrastate conduct does not fall within this class of activities simply because its aggregate financial impact is substantial. Cf. J.A. 42.

The Court appropriately restricted the aggregation device to commercial activities in light of what may be "necessary and proper" to regulate interstate commerce. Unlike noncommercial conduct, intrastate commercial activities frequently are "nationally significant in their cumulative effect, such as altering the supply-and-demand relationships in the interstate commodity market." *Hodel* v. *Virginia Surface Mining Ass'n*, 452 U.S. 264, 307 (1981). And in-state commercial activities may directly limit interstate commerce, as when some participants in commerce, because of their race, cannot purchase lodging or other accommodation while traveling. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

Commercial activities also pose the risk of competitive regulation among the States, which might lead to a regulatory "race to the bottom" that could injure interstate commerce by flooding it with products produced under detrimental condi-

tions. See *Darby*, 312 U.S. at 122; *Virginia Surface Mining*, 452 U.S. at 281-282. Moreover, the Dormant Commerce Clause prevents any single State from protecting its home industries by forbidding the entry of goods from States with less salutary industrial standards.[9] As a result, Congress can and has regulated the incidents and byproducts of manufacturing and mining to ensure that interstate commerce cannot become the vehicle for this socially injurious form of competition. *E.g.*, *Virginia Surface Mining*, 452 U.S. at 279-282.

d. The effects of arson cannot be aggregated for purposes of constitutional analysis — and the jurisdictional element overlooked or downgraded into insignificance — for a simple reason. Arson as defined in Section 844(i) — mere damage or destruction by fire or explosives — is not commercial conduct. Arson cannot be characterized as an activity that "arise[s] out of or [is] connected with a commercial transaction" (*Lopez*, 514 U.S. at 561) that, although intrastate, has a discernible and definable connection with an interstate market or other interstate commercial process. The mere destruction of property by fire "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Ibid.* Burning a building or other property does not involve any economic transaction or exchange. See *Lopez*, 514 U.S. at 559, 561. Cf. *McClung*, 379 U.S. 294; *Heart of Atlanta Motel*, 379 U.S. 241. Arson also does not involve the manufacture or production of a commodity that may be exchanged in interstate commerce or that may compete with such products. See *Lopez*, 514 U.S. at 559-560. Cf. *Wickard*, 317 U.S. 111 (regulating wheat); *Virginia Surface Mining*, 452 U.S. 264

[9] See Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 647 (1946); Stern, *The Commerce Clause and the National Economy, 1933-1946, Part II*, 59 HARV. L. REV. 883, 883 (1946). Robert L. Stern, who litigated many of the New Deal-era Commerce Clause cases on the government's behalf, see Stern, *supra*, 59 HARV. L. REV. at 645 n.*, has explained that the government relied on precisely this rationale to defend federal regulation of intrastate activities in cases such as *Darby*. Stern, *supra*, 59 HARV. L. REV. at 887.

(regulating mining). And because one arson generally bears no economic relation to another, and there is no interstate market for arson, there is no causal interdependence or other connection between arson nationwide that would support aggregating — and prohibiting — them all. Neither arson nor arsonists (as broadly defined by Section 844(i)) "have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

Across-the-board federal regulation of arson — defined so generally as to include residential property or other property not actually in commercial use — cannot be upheld as necessary and proper to protect interstate commerce against disruption. No effects on interstate commerce of a residential arson, such as possible interruption of natural gas service to one recipient, exceed the bounds of what the laws of a single State can and do protect. Likewise, there is no prospect of a race to the bottom among States to loosen their arson laws in order to attract more arsonists. One State's failure to enforce arson laws (or its failure to enact an arson law as stringent as that of a neighboring State) will hurt that State, not other States or the commerce among them. Because Section 844(i) cannot be said to regulate conduct with a substantial effect on interstate commerce by virtue of the aggregation principle, the jurisdictional element of Section 844(i) remains the focus of substantial effects analysis for that statute.

The Seventh Circuit approached Section 844(i) as if it were part of a greater regulation of the real estate market, or of the residential real estate market. See J.A. 42-44. The court of appeals misapplied this Court's statement in *Russell*, where, in holding, unremarkably, that the "rental of real estate" was an "activity affecting commerce" within the meaning of Section 844(i), the Court also observed that "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity with that class." 471 U.S. at 862. With respect, how-

ever, the latter observation, not made in the context of a constitutional challenge to the statute, misstates the nature of Section 844(i).

Section 844(i) is not part of any broader scheme of federal regulation of the "rental market for real estate." To the contrary, Section 844(i), for all intents and purposes, stands alone as a simple prohibition of a crime that Congress found independently offensive — a crime that, unlike an "intrastate extortionate credit transaction[]," *Lopez*, 514 U.S. at 559 (citing *Perez* v. *United States*, 402 U.S. 146 (1971)), is not itself a "commercial transaction" or bound up with one (see *id.* at 561). ***All*** that Section 844(i) regulates is setting property on fire (or trying to do so). Whatever federal regulation, beyond the application of the antitrust laws (see *McLain* v. *Real Estate Board*, 444 U.S. 232 (1980)), might permissibly apply to the conduct of the real estate business, rental or otherwise, a broad application of Section 844(i) to wholly noncommercial conduct cannot be justified as necessary to preserve the integrity of a regulatory scheme that does not exist.

Only a limitation of federal regulation to certain property closely connected to interstate commerce could conceivably bring the prohibition in Section 844(i) within the scope of a regulation of commerce. But the arson at issue in this case — arson of a private residence, not used in business or for any other broadly commercial purpose — cannot rationally be characterized as "commercial" conduct even then. See Nelson & Pushaw, *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 147 (forthcoming 1999) (copies lodged with the Clerk of the Court). If the damage or destruction of private residences is sufficiently "commercial" to support broad-scale regulation, then every sidewalk mugging, purse-snatching, and barroom brawl also falls within Congress's reach.

2. *Fundamental Principles Of Federalism And Enumerated Powers Preclude The Use Of Aggregation To Undercut The Constitutional Role Of The Jurisdictional Element In This Case*

Federal regulation of arson is suspect for reasons that render the use of aggregation to establish "substantial effects" still more inappropriate than with other noncommercial conduct. Federal regulation of arson impinges on an area of traditional state regulation, so that the Court should be particularly vigilant to keep the intrusion within permissible bounds. A crude use of aggregate financial impact to justify the application of Section 844(i) here would supply a rationale for transforming the Commerce Clause into the means for federal regulation of all or nearly all local crimes. That transformation disregards not only the federalism that informs the doctrine of enumerated powers, but the structure of the Constitution itself.

a. As this Court repeatedly has explained, "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993), and *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)). Although the States can legislate in any field, the "Constitution * * * withhold[s] from Congress a plenary police power." *Id.* at 566.

From the earliest days of the Republic, it has been "clear[] that Congress cannot punish felonies generally." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821). The Commerce Clause empowers Congress to regulate interstate and foreign commerce, and that regulation may include criminal proscriptions and penalties. But the commerce power, although broad within its defined sphere, "is subject to outer limits." *Lopez*, 514 U.S. at 557. Certain spheres of conduct do not constitute commercial activity and thus cannot be regulated directly and generally by Congress in an exercise of the commerce power. These areas include public education, child-rearing, marriage and divorce, and violent crime. See *id.* at 564-565.

Except to the extent that it may be bound up with a commercial activity, arson is a traditional crime falling within the heartland of traditional "criminal law enforcement," an area in which "States historically have been sovereign." *Lopez*, 514 U.S. at 564. The arson of private residences is a felony in every State, and has been since before Independence. See Poulos, *supra*, 51 MO. L. REV. at 342-344 & nn.221, 223-262; Panneton, *supra*, 23 AM. CRIM. L. REV. at 151; see generally A. CURTIS, A TREATISE ON THE LAW OF ARSON (1936). There is no indication that States are unwilling or unable to enforce their arson laws. See Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 799 (1996). Applying the aggregation device to Section 844(i) thus would result in a broad intrusion on a subject of traditional and thorough state regulation. That weighs heavily against a conclusion that extending federal power over all or substantially all arson is necessary and proper to protect interstate commerce. See *Printz* v. *United States*, 521 U.S. 898, 923-924 (1997); see also Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMM. 93, 100-101 (1985).[10]

b. In addition, the use of aggregation analysis in this case rests on a rationale that effectively would grant Congress plenary authority over every activity in modern life. This Court has made clear that, where Congress seeks to regulate a noncommercial activity in an area of traditional state regula-

[10] The potential displacement of state authority is sweeping. The savings clause applicable to Section 844(i), 18 U.S.C. § 848, is a sobering reminder that, if Congress can federalize all or virtually all arson (or any other crime), it also could entirely ***preempt*** state control of that crime. Even without preemption, the federalization of local crimes "displace[s] state policy choices" on what activities to prohibit, what substantive and procedural rights to grant criminal defendants, and what punishments to mete out. *Lopez*, 514 U.S. at 561 n.3. For example, the death penalty provided for some violations of Section 844(i) effectively nullifies the choice of thirteen States and the District of Columbia to ban capital punishment for local crimes. See Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1166 & n. 171 (1995).

tion, its rationale for doing so must not be so broad as "to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. But if the federal government can regulate a common-law crime — committed against immovable property within a State, where that property is not demonstrably used to advantage in any commercial activity, but rather is used in that most local of pursuits, private residence — simply because of the aggregate economic effect of thousands of sporadic and unrelated residential arson, then Congress in fact possesses the police power denied it by the Framers.

If aggregation for the purpose of demonstrating a substantial effect on interstate commerce consists of no more than adding up the costs of an activity, the aggregate financial impact of any garden-variety criminal conduct is significant. Thefts impede the flow of currency or require replacement of stolen property. Violent crime imposes medical costs and decreases worker productivity. Graffiti increases the market demand for paint (and paint remover). Indeed, given the substantial economic impact of other forms of noncommercial behavior such as exercise (see Krucoff, *Get Moving; Stop Trying To Be Thin and Start Trying To Be Healthy*, WASH. POST., Aug. 12, 1997, at Z10 ($4 billion annual medical costs would be saved if 25% of sedentary people exercised regularly)), or insomnia (see 140 CONG. REC. 14,211 (1994) (Sen. Hatfield) (estimating annual economic impact of insomnia at $92.5-107.5 billion)), Congress could presumably regulate jogging and sleeping under the rationale of the Seventh Circuit.

And if an arson prohibition may be justified by the "interstate * * * character" of the "residential housing industry," so could nationwide zoning regulations (limited, perhaps, to structures that received utilities from interstate systems). Indeed, any number of daily activities involve the same use and consumption of goods and services that move in interstate

commerce, and thus might be subject to federal regulation on the same basis.[11]

That cannot be possible under the Commerce Clause. That Clause is not a subtle grant of a plenary police power. That provision speaks only of "commerce," and only of such commerce involving more than one State or sovereign nation. See Redish & Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 41 (1987). To extract a general police power from that limited grant would flatly disregard the stated intentions of the Framers, who envisioned that "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45, at 292-293 (J. Madison) (C. Rossiter ed. 1961).

c. Reading the Commerce Clause to permit federal criminal regulation over any behavior with aggregate economic significance — that is, over any crime at all (see generally R. POSNER, ECONOMIC ANALYSIS OF LAW 237-270 (5th ed. 1998); Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968)) — also would improperly eradicate the limitations on Congress's enumerated powers addressing crime and intrastate violence. See *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457, 468-469 (1982). A view that the most basic and traditional crimes may be regulated in full by the federal government cannot be reconciled with the Constitution's grant of congressional authority over crime in only four

[11] See *McGuire*, 178 F.3d at 210 (noting that "driving a few blocks to pick up one's children (consumption of gasoline refined from foreign oil, and wear and tear on vehicle manufactured in another state or country) or eating dinner in front of one's own television set (consuming food and beverages from outside of state or country, as well as decisions on how to spend hundreds of millions of advertising dollars)" would fall within federal authority under this overbroad rationale).

discrete areas.[12] And that view also would render superfluous Article IV, Section 4, which sets out the limited role for Congress in regulating local crime within the States: "[t]he United States shall * * * protect each of [the States of this Union] * * * on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." By its plain terms, the Domestic Violence Clause requires a proper request from a State before the federal government may act against intrastate violence.[13] The existence of these powers should create a strong presumption against the derivation of additional powers to create federal crimes. Under these circumstances, a regulation of a crime like arson surely cannot be justified as a regulation of commerce without proof of substantial effect on commerce in an individual case.

d. The contemporaneous views of the legislative and executive branches that Section 844(i) required a jurisdictional element to be constitutional reinforce the conclusion that Section 844(i) can satisfy the substantial effects test only through application of an individualized jurisdictional nexus, and not through aggregation of the effects of arson as a whole. The structure of the statute, along with the legislative history discussed above (at pp. 2-4), shows that Congress and the Executive Branch both believed that Congress lacked the constitutional power to regulate arson without including a jurisdictional element, and lacked the constitutional power to regulate arson of private homes at all. That assessment —

[12] See U.S. CONST. art. I, § 8, cl. 6 (power to punish counterfeiting of United States securities and coin); *id.* cl. 10 (power to "punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations"); *id.* cl. 17 (plenary power over seat of federal government and federal enclaves); *id.* art. III, § 3 (power to punish treason).

[13] See W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 299 (2d ed. 1829); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ¶ 1819, at 684-685 (1833 ed.) (Fred. B. Rothman & Co. 1991); Bybee, *Insuring Domestic Tranquility*: Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 3-4 (1997).

which reflects the view of the co-equal branches at the time of the enactment of Section 844(i) that their power was ***limited*** beyond what is contended here — warrants substantial consideration by this Court. See *City of Boerne* v. *Flores*, 521 U.S. 507, 535-536 (1997).

* * * * *

To deem the arson of a private home a "commercial" or "economic" activity would divest the terms of "any real limits," *Lopez*, 514 U.S. at 565, and would make the Commerce Clause into the source of the general police power which the Constitution forbids to Congress. See *id.* at 567. Accordingly, arson of a private residence must be treated as a noncommercial activity, which cannot be regulated on the ground that, in the aggregate, it has a substantial economic effect on interstate commerce. *Id.* at 566-567. Rather, the constitutionality of Section 844(i) as regulation of an activity that substantially affects interstate commerce depends on the results of the "case-by-case inquiry" triggered by the statute's jurisdictional element. *Id.* at 561-562.

B. The Jurisdictional Element In Section 844(i) Precludes Regulation Of Intrastate Conduct That, Like The Conduct Here, Does Not Substantially Affect Interstate Commerce

The inclusion of a jurisdictional element in a federal statute may permit Congress to regulate activities that otherwise lack "a substantial relation to interstate commerce" because they do not in general "substantially affect interstate commerce." *Lopez*, 514 U.S. at 559. A statute that contains an "express jurisdictional element which * * * limit[s] its reach to a discrete set of" intrastate activities "that additionally have an explicit connection with or effect on interstate commerce" may be constitutionally applied to a particular instance of that "discrete set" of activities. *Id.* at 562. But a jurisdictional element does not permit regulation outside the three categories of activity identified in *Lopez*. Indeed, when inartful drafting prevents a jurisdictional element from winnowing the constitutional

applications from the impermissible ones, this Court will not permit the statute to be applied to conduct that does not have a ***constitutional*** connection with interstate commerce. See generally *Five Gambling Devices*, 346 U.S. at 446-452 (plurality opinion). Cf. *Bass*, 404 U.S. at 350.

1. The role of the courts in applying statutes that rely for their constitutionality on jurisdictional elements contrasts sharply with the far more limited judicial role when no jurisdictional element is necessary. When a statute legitimately regulates an ***entire*** class of activities through the Commerce Clause, courts may not "excise as trivial, individual instances of the class." *Perez*, 402 U.S. at 153 (quoting *Wirtz*, 392 U.S. at 193). The only question in such cases is whether the class of activities falls "within the reach of the federal power." *Darby*, 312 U.S. at 120-121.

But where a class of activities can be regulated by the federal government only with the safeguard of the "case-by-case" scrutiny afforded by a jurisdictional nexus to interstate commerce, see *Lopez*, 514 U.S. at 561-562, the role of the Court "differs significantly." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 192 n.12 (1974). Inclusion of a jurisdictional element signals that at least some instances of the regulated conduct lack a sufficient connection to interstate commerce to fall within the commerce power, thus requiring careful judicial scrutiny to keep the statute's application within constitutional limits. See *North American*, 327 U.S. at 699. In such cases, Congress has "left it to the courts to determine whether the intrastate activities have the prohibited effect" on interstate commerce necessary for federal regulation. *Darby*, 312 U.S. at 120; see also, *e.g.*, *Wirtz*, 392 U.S. at 192. Because only those intrastate activities that "substantially affect" interstate commerce fall within the commerce power, *Lopez*, 514 U.S. at 559, it therefore is the function of the courts, "through case-by-case inquiry," *id.* at 561-562, to confine the application of the statute to those instances that substantially affect interstate commerce. See *Bass*, 404 U.S. at 350 (setting

aside conviction because the lower courts had not required "proof of some interstate commerce nexus in each case").

Accordingly, application of a statute with a jurisdictional element to particular conduct requires stricter judicial scrutiny, and a stronger showing of an effect on interstate commerce, than application of a statute regulating an entire class of activities found by Congress to have a substantial effect on interstate commerce. In cases like this one, there is no broad congressional finding — express or implicit — to which a court might defer.[14] See Lopez, 514 U.S. at 562-563. Wirtz, 392 U.S. at 192-193; *Darby*, 312 U.S. at 120-121; see also, *e.g.*, D. ENGDAHL, CONSTITUTIONAL FEDERALISM § 3.09, at 39 (1987). The nexus with interstate commerce established by the satisfaction of the jurisdictional element in a particular case must stand or fall on its own.

2. A statute cannot be constitutionally applied if the nexus with interstate commerce in a particular case does not satisfy the jurisdictional element chosen by Congress. As this Court pointed out in *Russell*, whatever the scope of Congress's power to enact anti-arson legislation, "[b]y its terms, * * * the statute only applies to property that is 'used' in an 'activity' that

[14] When Congress seeks to regulate intrastate conduct, its justification must be clear and apparent. *Polish National Alliance*, 322 U.S. at 652-653 (Black, J., concurring) (citing *City of Yonkers* v. *United States*, 320 U.S. 685, 690 (1944); see also, *e.g.*, Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 814 (1996). Congressional findings may show that a particular regulated activity is sufficiently related to interstate commerce to fall within the commerce power even though the relationship is not "visible to the naked eye." *Lopez*, 514 U.S. at 563. But Congress may not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government." *M'Culloch*, 17 U.S. (4 Wheat.) at 423. Close scrutiny of supporting findings is especially appropriate where the intrusion upon a matter of state concern is apparently limitless, while the connection to an enumerated power is exceptionally tenuous. See M. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 56-57 (1995). Here, no congressional findings support extending a federal arson prohibition to private residences or other buildings not currently in commercial use.

affects commerce." 471 U.S. at 862. Congress thus narrowed the field of connections with interstate commerce that may make the application of *this* statute constitutional (or may fail to do so). Courts can no more use constitutional theory to broaden a statute beyond its text than they can permit a statute to exceed the limits of congressional power. Thus, if Section 844(i) must be construed to apply to at least some private residences, but the existence of utility service, a mortgage, and insurance do not constitute "use[s]" of the property within the statutory terms, the statute cannot be constitutionally applied to this case.

But even if the factual nexus ***does*** satisfy the element as written, the application nonetheless may not be constitutional if the individual circumstances do not show a substantial effect on interstate commerce. This Court has never held that a jurisdictional element might be satisfied by intrastate conduct with only an attenuated or *de minimis* effect on interstate commerce. The reason for that is clear: Congress may not "use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez*, 514 U.S. at 558 (quoting *Wirtz*, 392 U.S. at 197 n.27).

Although the Court has changed its view of what types of effects are too attenuated, compare, *e.g.*, *Copp Paving*, 419 U.S. 186 (1974) with *United Leather Workers' Int'l Union* v. *Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924), its recognition and enforcement of limits on the causal chain have remained intact. In repeating Justice Cardozo's warning, this Court recognized that "[t]here is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce." *Lopez*, 514 U.S. at 567 (quoting *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)). Some limit on the degree of causal attenuation is necessary if there is to be any distinction between the truly national and the truly local, *Lopez*, 514 U.S. at 567, as this Court repeatedly assures that there is. *Id.* at 566-568; see also, *e.g.*, *Jones & Laughlin*, 301 U.S. at 30.

It is not only logical, but necessary to the preservation of a federal system, that the satisfaction of a jurisdictional element demonstrate as qualitatively substantial an effect on commerce in the particular instance as a regulated activity would have to manifest in general in order to support an exercise of the commerce power in the absence of a jurisdictional element. If nothing more were required for exercise of the commerce power than a demonstration of ***some*** nexus between regulated intrastate conduct and interstate commerce, Congress could regulate all activities of modern life. See 1 TRIBE, *supra*, at 831 n.29.

3. The Seventh Circuit recognized that the connections between interstate commerce and the regulated conduct (and subject residence) in this case did not demonstrate a substantial effect on interstate commerce. J.A. 41. The connections between Jones's crime and interstate commerce are trivial at best. The existence of utility service, a mortgage, and insurance are widespread incidents of real (and even personal) property. See pp. 23-25, *supra*. The connections between the property and interstate commerce — much less between the potential effects of the crime and interstate commerce — are remote and insignificant in quality. And the actual effects of the crime were still less significant. The out-of-state company that held a mortgage on the property suffered no loss as a result of the fire, see J.A. 12-14, 17, and there is no evidence that the arson interrupted the property's receipt of out-of-state natural gas, see *id.* at 15-16, 17-18.

If such connections to interstate commerce suffice to support the exercise of federal power under the Commerce Clause, Congress could regulate any crime that resulted in a loss of currency that had been, or would have been, spent in interstate commerce. Because any theft affects commerce in this way, Congress would have plenary power to regulate theft

— as some courts apparently believe.[15] Approving application of a jurisdictional element that may be satisfied by such "distant repercussions" on interstate commerce would transform the run of local concerns into potential subjects of federal regulation. *Schechter Poultry*, 295 U.S. at 554 (Cardozo, J., concurring); *Santa Cruz Fruit Packing*, 303 U.S. at 466; see also *Lopez*, 514 U.S. at 567. That cannot be reconciled with this Court's recognition that the commerce power has enforceable limits. 514 U.S. at 564-565.

4. Even if the effects of arson can be aggregated in the course of deciding whether Congress can regulate any arson at all under the Commerce Clause, the application of Section 844(i) to the arson of a building devoid of commercial activity remains unconstitutional. Where the regulated activity is as far removed from common conceptions of commerce and commercial activity as is the mere arson of a residence, the effect of aggregation is diminished, and the connection between the particular incidence of the conduct and interstate commerce still must carry most of the load in ensuring that federal regulation reaches only activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 559.

Thus, speculative and attenuated connections between conduct and interstate commerce cannot support an exercise of federal power where, as here, the entire class of activities cannot be federally regulated because of an inherent connection with commerce. In-state violence against immovable in-state property — property that has no more to do with interstate commerce than almost any other real property — does not have a substantial effect on interstate commerce even if other arson

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[15] Several courts have upheld application of the Hobbs Act to theft or extortion from small businesses on the grounds that stolen money otherwise might have been spent in interstate commerce. See, *e.g.*, *United States* v. *Zeigler*, 19 F.3d 486, 491-493 (10th Cir.), cert. denied, 513 U.S. 1003 (1994); *United States* v. *Boston*, 718 F.2d 1511, 1516-1517 (10th Cir. 1983), cert. denied, 466 U.S. 974 (1984); *United States* v. *Elders*, 569 F.2d 1020, 1025 (7th Cir. 1978).

might. The nexus between property and its insurance, credit, and utility service is too loose to make damage to that property "substantially affect" interstate commerce. The arson here did not and could not shut down or alter any business. The greatest contemplated effect on interstate commerce seems to be the payment of an insurance claim — a routine and distant effect indeed. There are too many steps between Jones's Molotov cocktail and interstate commerce to support an exercise of federal power here.

* * * * *

The "momentary political convenience" of federalizing state-law crimes too frequently renders the political checks on federal regulation "illusory." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring); see also AMERICAN BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 2, 15 (1998). It is entirely appropriate, and indeed essential, for this Court to enforce (and reinforce) the structural limits of our federal system rather than to acquiesce in its erosion "by indifference to its maintenance or excessive regard for the unifying forces of modern technology." *Polish National Alliance*, 322 U.S. at 650 (Frankfurter, J.). However it is viewed, the application of Section 844(i) to this case falls outside Congress's power "[t]o regulate Commerce * * * among the several States."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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